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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1340

HERMAN GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1970. A petition for rehearing was denied on February 18, 1970. On March 20, 1970, the petition for a writ of certiorari was filed. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether during the course of a valid search pursuant to warrant, it was proper to detain items not described in the warrant but which appeared upon discovery to be stolen property.

2. Whether it was proper to instruct that possession of recently stolen merchandise permitted an inference that the possessor knew the property was stolen, in view of the time which elapsed between the theft and the discovery of possession.

3. Whether reversal by the court of appeals on one count required reversal of the remaining two counts.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of unlawful receipt of merchandise stolen from an airport while the merchandise was moving in foreign commerce (Count 2; 18 USC 659); and unlawful receipt of merchandise stolen and then shipped in interstate commerce (Counts 3 and 4; 18 USC 2315).[1] On February 19, 1969, he was sen-

[1] Petitioner was arraigned on four counts. Count 1 involved the alleged receipt by petitioner of jewelry stolen from a shipment in foreign commerce in January 1968. This count, which gave rise to the search warrant used to search petitioner's home, was dismissed before trial because an important witness failed to appear (Pet. App. 12). Petitioner was convicted

tenced to concurrent sentences of ten years' imprisonment on each count.

The evidence showed that on August 20, 1966, 345 watch movements, imported from Switzerland and en route to a United States consignee, were stolen from a Chicago airport (Count 2; see 2 A. 460-464).[2] On December 2, 1967, approximately $250,000 worth of jewelry was stolen in an armed robbery of a Garden City, New York, jewelry store (Count 3; see 2 A. 466-493). On March 18, 1968, F.B.I. agents searched petitioner's home in the Miami, Florida, area pursuant to a search warrant and found the stolen watch movements and a portion of the stolen jewelry (1 A. 115-128, 2 A. 401, 479-480; Pet. App. 2-3).

The circumstances of the search gave rise to motions to suppress. The evidence showed that for some months prior to the search F.B.I. Agent Yablonsky had attempted to establish rapport with petitioner in an effort to obtain information from him regarding the criminal activities of jewel thieves (2 A. 288-

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of the remaining three counts. Count 4, which involved the interstate transportation of jewelry stolen in an armed robbery of an Atlanta department store, was reversed by the court appeals on the ground of inadequate value for federal jurisdiction (Pet. App. 13-14).

[2] "A." preceded by the volume number refers to petitioner's four volume appendix of the proceedings below. This appendix, on file with the Clerk of this Court, includes the transcripts of the hearings held on the motions to suppress. It does not include the trial transcript, other than the transcript of the conference held on the final charge to the jury, argument of counsel, and the charge to the jury. Volume 3 A. contains the exhibits, while 4 A. contains the court of appeals' opinion.

289, 292, 323-326, 343).[3] On March 14, 1968, Agent Yablonsky went to petitioner's home to inquire if petitioner was the Herman Gordon listed on a flight manifest as a person who had recently traveled from Florida to the Dominican Republic (2 A. 297-302). While in the home, Agent Yablonsky observed (2 A. 339-340) two distinctive cups (2 A. 370). After examining pictures of recently stolen articles on file with the F.B.I., he concluded that they had been part of a 187-piece shipment of Greek jewelry recently stolen from a foreign shipment (Count 1). Yablonsky made an affidavit and obtained a warrant to search petitioner's apartment for this shipment (1 A. 1-6). During the course of the search which followed, the agents had found only the two cups Yablonsky had noted when they came upon a locked closet. Petitioner asked them not to search it, promising that if they did not do so, he would supply them with information (2 A. 315, 381). Agent Yablonsky told him no deal could be made (2 A. 315). Petitioner unlocked the closet (2 A. 382, 429).

In the closet, the agents saw suitcases piled on one another and items of jewelry lying on the floor (2 A. 316). After cursory examination of the contents, Agent Yablonsky left to get a second warrant. Some agents remained in the apartment while petitioner kept the key to the closet (2 A. 316-320, 382, 429,

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[3] Petitioner was regarded as an associate of known jewel thieves and had some years before participated in the negotiations for the return of the Star of India Sapphire and the DeLong Ruby, stolen from the American Museum of Natural History in New York City (1 A. 37, 148-149).

437). After the second warrant was obtained, the agents proceeded to make a thorough search and a detailed inventory.[4] Among the items found were 22 pieces from the Greek jewelry shipment, and the watch movements and jewelry which became the bases of counts 2 and 3 of the indictment (1 A. 115-128, 2 A. 401, 479-480). The return on the first warrant listed as seized thereunder only the 2 cups; the return on the second warrant included the 22 additional pieces of Greek jewelry as well as numerous other items.

The trial court denied the motion to suppress, ruling that the search was not a general exploratory search for evidence, but was in valid execution of the initial search. Although it ruled that the second warrant was of no significance since the "seizure" had occurred before the warrant was obtained, it held that the agents had authority to seize the items other than those mentioned in the warrant (2 A. 517-521; Pet. App. 4).

ARGUMENT

1. Pointing to the fact that the return to the first warrant listed only 2 cups, and relying on the district court's ruling that the second warrant was of no significance, petitioner argues that the courts below erred in holding that the agents had authority to seize the stolen items other than the Greek jewelry to which the initial warrant was directed. (Pet. 12-14). These items, however, were uncovered in the course of a lawful search.

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[4] With the consent of petitioner's counsel, the nine suitcases which were seized were inventoried at a later time.

The officers were searching for the 187 items of Greek jewelry, items of small bulk and which had been contained in a small box. (1 A. 1-3, 2 A. 306-307, 334-335, 344-346). Since only two of these stolen items, the cups, were visible when the agents entered the apartment, it was proper for them to search the entire apartment for the other pieces, including closets and drawers where the stolen merchandise might have been secreted. See *Warden* v. *Hayden*, 387 U.S. 294.[5]

When, in the course of that lawful search, the agents uncovered numerous other items of jewelry in the house of a known associate of jewel thieves, they were not required to shut their eyes to their existence. A police officer may seize an item even though "it was not one of the things it was his business to look for." *Abel* v. *United States*, 362 U.S. 217, 238; *Matthews* v. *Correa*, 135 F.2d 534, 536-537 (C.A. 2); *Gurleski* v. *United States*, 405 F.2d 253, 258 (C.A. 5), certiorari denied *sub nom. Smith* v. *United States*, 395 U.S. 977; *United States* v. *Eisner*, 297 F.2d 595, 597 (C.A. 6), certiorari denied, 369 U.S. 859; *Seymour* v. *United States*, 369 F.2d 825 (C.A. 10), certiorari denied, 386 U.S. 987; see *Zap* v. *United States*, 328 U.S. 624, 629. Having come upon wholesale quantities of watch movements and other jewelry of great value

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[5] *Chimel* v. *California*, 395 U.S. 752, is not to the contrary. That case limited the areas to be searched when a search made without a warrant is justified as incident to an arrest. Where a warrant is obtained, the premises described may be subjected to as thorough a search as the warrant permits.

the agents were authorized to seize them, as well as the items of Greek jewelry that were named in the warrant. See *Harris* v. *United States*, 331 U.S. 145.

Moreover, we do not believe that the district court was correct in disregarding the second warrant. The agents, who were lawfully on the premises, did not remove the other jewelry but took precautions to assure that it would not be tampered with during the short period necessary to obtain a warrant. This brief detention was not an unreasonable seizure under the Fourth Amendment. See *United States* v. *Van Leeuwen*, No. 403, this Term, decided March 23, 1970. The agents here showed scrupulous care in getting a second warrant from the magistrate when their lawful search for the Greek jewelry uncovered new evidence of crime.

2. At trial, the court instructed the jury that possession of recently stolen property, if not satisfactorily explained, was a circumstance from which it might reasonably infer, although it was not required to do so, that the possessor knew the property had been stolen. The court explained that the jury was not required to draw this inference; that the term "recently" was a term without fixed meaning, dependent on the nature of the property and all the facts and circumstances shown by the evidence in the case; and that "the longer the period of time since the theft, the more doubtful becomes the inference which may reasonably be drawn from unexplained possession" (2 A. 503). Petitioner objected to this instruction (2 A. 451).

The court's instruction was proper. As this Court has held, possession of the fruits of crime soon after its commission justifies a permissible inference that possession is guilty possession. *Wilson* v. *United States*, 162 U.S. 613, 619; *Rugendorf* v. *United States*, 376 U.S. 528, 536-537. Unlike the statutory inference held invalid in *Leary* v. *United States*, 395 U.S. 6, 29-53,[6] there is a rational relationship between unexplained possession of recently stolen property and the inference of guilty knowledge. The instruction given in the present case amounted to no more than permission to the jury to make a commonsense deduction from the evidence. Its substance has consistently been approved. *United States* v. *Williams*, 405 F.2d 14, 17 (C.A. 4); *Wangrow* v. *United States*, 399 F.2d 106, 118 (C.A. 8), certiorari denied, 393 U.S. 933; *Glavin* v. *United States*, 396 F. 2d 725, 729 (C.A. 9), certiorari denied, 393 U.S. 926; *Gregory* v. *United States*, 364 F.2d 210, 213 (C.A. 10), certiorari denied, 385 U.S. 962.

While petitioner complains of the 19 months which elapsed between the theft and the proof of possession as to Count 2, only 3½ months elapsed as to Count 3. In this situation, the time lapses do not detract from the propriety of the instruction as to recent possession. Recency of possession is not measured by any fixed standard of time; the circumstances of each case determine whether an inference of guilty knowledge may be drawn from the possession of the stolen property. Recency, therefore, is a relative term and

[6] Compare *Turner* v. *United States*, 396 U.S. 398, 405-418.

presents a question of fact solely for the jury. *Boehm* v. *United States*, 271 Fed. 454, 457 (C.A. 2); *United States* v. *Licausi*, 413 F.2d 1118, 1121 (C.A. 5), certiorari denied, 396 U.S. 1006; *Anderson* v. *United States*, 406 F.2d 529, 534 (C.A. 8). In the present case, the large quantity of watch movements and the unique nature and high value of the jewelry stolen raised, as the court of appeals concluded, "inherent difficulties in disposing of stolen property of this character" (Pet. App. 13). Accordingly, there was no error in submitting the matter of recency to the jury for its determination on each of the two counts.[7]

3. Petitioner contends that the court of appeals' reversal as to Count 4 requires reversal as to Counts 2 and 3 because of the danger of a "spillover" of evidence from Count 4 to the two remaining counts (Pet. 18-19). Count 4, the reversed count, pertained to petitioner's possession of the mountings for two diamond rings which had been stolen recently from an Atlanta, Georgia department store. The court of appeals reversed the conviction because of specific evidence in the record that petitioner acquired the mountings without the diamonds (Pet. App. 13). In that case, the value of the rings would not have been

[7] The government was not required to prove, as petitioner asserts, that petitioner knew who had stolen the property found in his possession, "nor when, where or how it had been stolen" (Pet. 19). All that is required is that a defendant must know the goods were stolen; he need even not know they were stolen from an interstate shipment. *United States* v. *Licausi*, *supra*, 413 F. 2d 1118, 1121 (C.A. 5), certiorari denied, 396 U.S. 1006. See *Donaldson* v. *United States*, 82 F. 2d 680, 682 (C.A. 7).

sufficient to warrant federal criminal jurisdiction under the statute. There was no doubt, however, as to either the identity of the mountings or petitioner's possession of them. In these circumstances, and since petitioner's possession of the other items for which he was charged was uncontestable, there was no possibility of prejudice.

After the petition for a writ of certiorari was filed, it was discovered that during 1963-1964 petitioner visited two locations where electronic surveillance of others was being conducted; his voice was overheard on two occasions. Petitioner had no proprietary interest in those premises. The two logs contain some discernable references and advice, in criminal argot, as to means of accomplishing criminal enterprises then currently contemplated. But petitioner was not arrested until March 1968, as a result of his receipt of goods stolen in January 1968 from an international air shipment (Count 1); and the subject matter of the earliest count in time (Count 2) involved merchandise stolen in August 1966, from another international air shipment, more than two years after the overheard conversations took place.

The procedure which this Court has usually followed, when advised by the Solicitor General that the government has conducted electronic surveillance of a convicted litigant, has been to remand the proceeding to the district court for a hearing to determine whether the interception was illegal and, if so, whether the conviction was tainted thereby. *E.g.*, *Alderman* v. *United States*, 394 U.S. 165. Resolution of the latter issue, if it is reached, has involved

a determination whether the government used the overheard conversations in "building its case against" the accused. *Alderman* v. *United States*, *supra*, 394 U.S. at 183. Since it is apparent that the overheard conversations of 1963-1964 in this case could have had no bearing on petitioner's possession in 1968 of property which had been stolen and had moved in interstate or foreign commerce in 1966 or thereafter, remand for this purpose is unnecessary. See our supplemental memorandum in *Moylan* v. *United States*, No. 885, this Term, certiorari denied, February 24, 1970, and in *Teresa* v. *United States*, No. 1200, this Term, certiorari denied, April 27, 1970.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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